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BK FLEET MANAGEMENT SDN BHD v. STANSON MARKETING SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[APPEAL NO: P-02(NCVC)(W)-223-01-2016]
26 JULY 2017

C ***CONTRACT:*** *Illegality – Knowledge – Agreements to provide trucks and services for consideration of monthly payments – Whether agreements for unlawful purposes – Whether agreements intended to circumvent s. 14(2)(a) of Commercial Vehicle Licensing Board Act 1987 ('CVLB Act') – Whether deliberate act – Whether agreements illegal – Contracts Act 1950, s. 24*

D The appellant ('the plaintiff') was in the business of supplying trucks and providing services and maintenance for the vehicles, whilst, the respondent ('the defendant') was engaged in the business of sales and distribution of bakery goods. The plaintiff and the defendant entered into four trucks supply and services agreements for a period of five years ('the agreements') wherein, the plaintiff would provide trucks and services, which included maintenance E in respect of the trucks, in return for a monthly sum from the defendant. It was agreed that all the trucks belonged to the plaintiff except for the trucks under one agreement which ownership would be transferred to the plaintiff upon the payment of a nominal token fee. The defendant failed to pay the monthly payment as per the agreements, and therefore, the plaintiff issued F a notice of demand and asked for the return of the trucks which were supplied by the plaintiff under the agreements. The defendant instead obtained a restraining order to restrain all parties from taking legal proceedings against the defendant including to recover the assets belonging to the defendant. The plaintiff thus initiated a suit claiming payment for the services rendered G under the agreements and a declaratory order that it was the beneficial owner of the trucks and for the trucks to be delivered to the plaintiff. The defendant disputed the claim and counterclaimed for the plaintiff to surrender the registration card of the trucks and cancel out its ownership endorsement on the registration card of the trucks. The High Court dismissed both the plaintiff's claims and the defendant's counterclaims, finding the agreements H void *ab initio* as they were for the unlawful purpose of circumventing s. 14(2)(a) of the Commercial Vehicle Licensing Board Act 1987 ('the CVLB Act'). Aggrieved, the plaintiff appealed against the decision, whilst the defendant cross-appealed against the dismissal of its counterclaim. The main

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issue for the court's determination pertained to the validity and enforceability of the four agreements, as to whether they were bad as being against public policy or bad for illegality under the Contracts Act 1950 ('the Act').

Held (allowing appeal)
Per Abang Iskandar JCA (for the majority):

(1) Both the parties had acted together in such a manner as to circumvent the provisions of the CVLB Act, pertaining to s. 14(2) on the licensing requirements. In particular, s. 14(2)(a) spells out two types of licences to be issued to users of commercial vehicles: (i) licence A, required for a commercial vehicle which is used to carry goods for hire or reward; and (ii) licence C, required for a commercial vehicle which is used to carry one's own goods. The plaintiff was required to obtain licence A in order to rent the trucks on hire to the defendant. (para 30)

(2) The parties had intended that s. 14(2) of the CVLB Act be circumvented by having the vehicles registered in the name of the defendant, when in fact, the vehicles belonged to the plaintiff. The arrangement that was entered into between the parties was a deliberate act actuated, as it were, by business consideration of profit and loss, with eyes wide open. The circumvention was done to defeat the express provision of the CVLB Act. Hence, there was clear evidence of circumvention of the provisions of the CVLB Act by both parties. (paras 31, 32, 33 & 34)

(3) 'The transferee, having got the property, could assert his title to it against all the world, not because he has any merit of his own but because there is no one who can assert a better title to it' (*Sajan Singh v. Sardara Ali*). Hence, the trucks would remain where they had 'fallen', apparently with the defendant. The trial judge thus did not commit any error in concluding the way he did. (paras 36-38)

(4) A contract that is illegal in itself is void and unenforceable by either party. As both parties had entered into the four arrangements in the agreements deliberately with their eyes wide open, it could not be stated by any stretch of the imagination that the four agreements 'is discovered to be void, or the contract becomes void...' within the contemplation of s. 66 of the Act. Therefore, the plaintiff could not avail itself of the provisions of s. 66 of the Act. The four agreements were caught by s. 24 of the Act (paras 40, 42 & 43)

A **Per Mary Lim JCA (dissenting):**

(1) The plaintiff was required to obtain carrier licence 'A' in order to rent the trucks on hire to the defendant. The plaintiff was said to be fully aware of this requirement but, because it would increase the monthly rental of the trucks, the trucks were registered in the defendant's name
B where a carrier licence 'B' is required. Based on the agreements, it was clear that the plaintiff provided fleet services which included maintenance of the fleet of trucks; but the trucks did not belong to, or were owned by, the plaintiff. The trucks belonged to individuals or other companies, including the defendant. (paras 63 & 65)

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(2) The defendant's contention was that the trucks were never the plaintiff's and it gave evidence to this effect. The trucks therefore belonged to the defendant. After the trial judge had accepted and relied on the documentary evidence showing that the trucks were indeed registered to the defendant, any suggestion to the contrary should not have been
D entertained as that was not the pleaded case of any of the parties. The agreements to provide fleet management services were perfectly valid and lawful. The agreements were not concerning licences under the CVLB Act or even about the type of licences to be obtained. The object, consideration and subject matter of all four agreements were not
E prohibited by s. 24 of the Act. (paras 75, 77, 87 & 89)

(3) This was not a case of *ex facie* illegality where the court may address and deal with the complaint at any time or stage of the proceedings, including at the appeal. The illegality, as pleaded, was that the registration was in the defendant's name and thereby the 'Options and
F first right' could not have been 'merely to give effect to the plaintiff's allegedly ownership of the trucks'; the registration was a record of the truth and the options and agreed term of the agreements to be exercised at the appropriate time, which time had yet to arise at the time of the filing of the action. Hence, the trial judge erred in concluding that the
G four agreements were void and unenforceable due to violations of s. 14(2)(a) of the CVLB Act and thereby s. 24 of the Act. (paras 78 & 79)

(4) Section 14 of the CVLB Act seeks to provide the requirement and possession of a valid carrier licence and what may be inferred to be prohibited in the section is the carrying of goods without either licence
H A or C. Since there were valid licenses issued to the trucks, and it could only be licence 'C', and since the defendant was the registered owner of the trucks, the matter of which of the two classes was a matter of implementation and arrangement of the logistical details. Without the

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substantially incontestable evidence that only licence A should have been obtained, the four agreements must be given the benefit of the doubt. (paras 109 & 117)

(5) The claim herein was for services rendered under the four agreements, which were admittedly rendered and must be paid. In fact, the defendant had offered to pay but had subsequently reneged. The trial judge was plainly wrong and had fundamentally misdirected itself on the law and on the facts. The decision on illegality was wrong and must be set aside. Hence, the appeal was allowed. (paras 117 & 119)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') menjalankan perniagaan membekalkan trak dan memberi perkhidmatan dan penyenggaraan kenderaan-kenderaan tersebut, sementara, responden ('defendan') terlibat dalam perniagaan penjualan dan pengedaran barangan dari kilang roti. Plaintif dan defendan memasuki empat perjanjian bekalan dan perkhidmatan trak untuk tempoh lima tahun ('perjanjian-perjanjian tersebut') di mana, plaintif akan menyediakan trak dan perkhidmatan, yang termasuk penyenggaraan trak, untuk balasan jumlah bulanan oleh defendan. Disetujui bahawa kesemua trak adalah milik plaintif kecuali trak-trak bawah satu perjanjian yang akan dipindah milik kepada plaintif selepas sejumlah kecil bayaran. Defendan gagal membuat bayaran bulanan seperti dalam perjanjian, dan dengan itu, plaintif mengeluarkan notis tuntutan dan meminta pemulangan trak-trak tersebut yang dibekalkan plaintif bawah perjanjian-perjanjian tersebut. Sebaliknya, defendan memperoleh perintah sekatan untuk menyekat kesemua pihak daripada memulakan prosiding undang-undang terhadap defendan termasuk mendapatkan semula aset milik defendan. Oleh itu, plaintif memulakan guaman menuntut bayaran bagi perkhidmatan yang telah diberi bawah perjanjian-perjanjian tersebut dan perintah deklarasi bahawa plaintif adalah pemilik benefisial trak-trak tersebut dan agar trak-trak tersebut diserahkan kepada plaintif. Defendan mempertikaikan tuntutan itu dan menuntut balas agar plaintif mengembalikan kad pendaftaran trak-trak tersebut dan membatalkan pengendorsan milikan pada kad pendaftaran trak-trak itu. Mahkamah Tinggi menolak kedua-dua tuntutan plaintif dan tuntutan balas defendan, mendapati perjanjian-perjanjian tersebut batal *ab initio* kerana perjanjian-perjanjian tersebut bertujuan mencanggah undang-undang dengan memintasi s. 14(2) Akta Lembaga Pelesenan Kenderaan Perdagangan 1987 ('Akta LPKP'). Terkilan, plaintif merayu terhadap keputusan tersebut, manakala, defendan membuat rayuan balas terhadap penolakan tuntutan balasnya. Isu utama bagi pertimbangan mahkamah berkait dengan kesahan dan kebolehlaksanaan keempat-empat perjanjian, sama ada adalah cacat kerana bertentangan dengan polisi awam atau cacat kerana kepenyalahan undang-undang bawah Akta Kontrak 1950 ('Akta').

Diputuskan (membenarkan rayuan)
Oleh Abang Iskandar HMR (keputusan majoriti):

(1) Kedua-dua pihak bertindak bersama-sama untuk memintas peruntukan Akta LPKP, berkaitan dengan s. 14(2) untuk keperluan pelesenan. Khususnya, s. 14(2)(a) memperuntukkan dua jenis lesen dikeluarkan kepada pengguna kenderaan perdagangan: (i) lesen A, diperlukan untuk kenderaan perdagangan yang digunakan untuk membawa barangan untuk sewa atau hadiah; dan (ii) lesen C, diperlukan untuk kenderaan perdagangan yang digunakan untuk membawa barangan sendiri. Plaintif perlu memperoleh lesen A untuk menyewakan trak-trak tersebut kepada defendan.

(2) Pihak-pihak mempunyai niat memintas s. 14(2) Akta LPKP dengan mendaftarkan kenderaan-kenderaan tersebut atas nama defendan, sedangkan hakikatnya, kenderaan-kenderaan tersebut milik plaintif. Urusan tersebut yang dimasuki antara pihak-pihak sengaja didorong oleh pertimbangan keuntungan dan kerugian, dengan pengetahuan penuh. Pemintasan tersebut dibuat untuk menggagalkan peruntukan Akta LPKP. Oleh itu, wujud keterangan jelas pemintasan peruntukan Akta LPKP oleh kedua-dua pihak.

(3) 'The transferee, having got the property, could assert his title to it against all the world, not because he has any merit of his own but because there is no one who can assert a better title to it' (*Sajan Singh v. Sardara Ali*). Oleh itu, trak-trak tersebut kekal di mana ditinggalkan, iaitu jelas pada defendan. Hakim bicara, oleh itu, tidak terkhilaf dalam keputusan beliau.

(4) Kontrak yang salah di sisi undang-undang itu sendiri, batal dan tidak boleh dikuatkuasakan oleh mana-mana pihak. Oleh sebab kedua-dua pihak memasuki keempat-empat pengurusan secara sengaja dengan pengetahuan penuh, tidak boleh dinyatakan bahawa keempat-empat perjanjian 'didapati batal, atau kontrak menjadi batal …' seperti yang dibayangkan dalam s. 66 Akta. Oleh itu, plaintif tidak boleh menggunakan peruntukan s. 66 Akta. Keempat-empat perjanjian tersebut terangkum bawah s. 24 Akta.

Oleh Mary Lim HMR (menentang):

(1) Plaintif perlu memperoleh lesen pengangkut 'A' untuk menyewakan trak-trak tersebut kepada defendan. Plaintif dikatakan mempunyai pengetahuan penuh tentang keperluan tersebut, tetapi, oleh sebab plaintif akan menambahkan sewa bulanan trak-trak tersebut, trak-trak tersebut didaftarkan atas nama defendan di mana lesen pengangkut 'B' diperlukan. Berdasarkan perjanjian-perjanjian, jelas bahawa plaintif

memberi perkhidmatan trak-trak; tetapi trak-trak tersebut bukan milik atau pernah dimiliki plaintif. Trak-trak tersebut dimiliki individu-individu atau syarikat-syarikat lain, termasuk defendan.

(2) Hujahan defendan, adalah bahawa trak-trak tersebut tidak pernah dimiliki plaintif dan memberi keterangan mengenai perkara itu. Oleh itu, trak-trak tersebut milik defendan. Selepas hakim bicara menerima dan bersandar pada keterangan dokumentar yang menunjukkan bahawa trak-trak tersebut sememangnya didaftarkan dengan defendan, apa-apa cadangan sebaliknya tidak wajar dilayan kerana itu bukan kes yang diplid oleh pihak-pihak. Perjanjian untuk memberi perkhidmatan pengurusan trak-trak tersebut jelas sah dan menurut undang-undang. Perjanjian-perjanjian tersebut bukan tentang lesen-lesen bawah Akta LPKP atau mengenai jenis lesen yang diperlukan. Tujuan, balasan dan perkara untuk keempat-empat perjanjian tersebut tidak dilarang oleh s. 24 Akta.

(3) Ini bukan kes kepenyalahan undang-undang *ex facie* di mana mahkamah boleh menangani aduan pada bila-bila masa atau peringkat prosiding, termasuk semasa rayuan. Kepenyalahan undang-undang yang diplidkan adalah pendaftaran dibuat atas nama defendan dan dengan itu, 'Opsyen dan hak pertama' tidak mungkin 'hanya untuk memberi kesan kepada hak milik plaintif terhadap trak-trak tersebut seperti didakwa'; pendaftaran tersebut adalah rekod kebenaran dan terma perjanjian-perjanjian yang dipersetujui untuk dilaksanakan pada masa yang sesuai, yang belum berbangkit pada masa pemfailan tindakan tersebut. Oleh itu, hakim bicara khilaf apabila memutuskan bahawa keempat-empat perjanjian tersebut batal dan tidak boleh dikuatkuasakan disebabkan oleh pencabulan s. 14(2)(a) Akta LPKP dan berikutannya, s. 24 Akta.

(4) Seksyen 14 Akta LPKP memperuntukkan keperluan dan milikan lesen pengangkut yang sah dan apa-apa yang boleh dianggap dilarang dalam seksyen ini adalah mengangkut barangan tanpa mana-mana lesen A atau C. Oleh sebab terdapat lesen-lesen sah bagi trak-trak tersebut, dan ia sepatutnya hanya lesen 'C', dan kerana defendan adalah pemilik berdaftar lesen-lesen tersebut, kelas antara dua lesen tersebut adalah perkara yang berkait dengan pelaksanaan dan pengurusan butiran logistik. Tanpa keterangan yang tidak boleh dipertikaikan bahawa hanya lesen A yang sepatutnya diperoleh, keempat-empat perjanjian mesti diberi faedah keraguan.

(5) Tuntutan ini adalah untuk perkhidmatan yang diberikan bawah keempat-empat perjanjian yang diakui diberikan dan mesti dibayar. Sebenarnya, defendan telah menawarkan untuk membayar tetapi kemudian memungkiri janjinya. Hakim bicara jelas terkhilaf dan

tersalah arah secara asasnya dari segi undang-undang dan fakta. Keputusan berkaitan kepenyalahan undang-undang adalah salah dan mesti diketepikan. Oleh itu, rayuan perlu dibenarkan.

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

China Road & Bridge Corp & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Edler v. Auerbach [1950] 1 KB 359 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Anor [2004] 4 CLJ 309 FC ***(refd)***

Holman v. Johnson [1775] 1 Cowp 341 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***

Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Mulpha Pacific Sdn Bhd v. Paramount Corp Bhd [2003] 4 CLJ 294 CA ***(refd)***

Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***

Patel (Respondent) v. Mirza (Appellant) [2016] UKSC 42 ***(refd)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

Theresa Chong v. Kin Khoon & Co [1976] 1 LNS 165 FC ***(refd)***

Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Wong Yee Boon v. Gainvest Builders [2017] 10 CLJ 209 CA ***(refd)***

Yeep Mooi v. Chu Chin Chua & Ors [1960] 1 LNS 169 FC ***(refd)***

Legislation referred to:

Commercial Vehicles Licensing Board Act 1987, ss. 14(2)(a), 34

Companies Act 1965, s. 176

Contracts Act 1950, ss. 2(g), 10, 24(e), 66

For the appellant - Lee Beng San & Saravanesh Supramaniam; M/s Allen Chee Ram
For the respondent - Not present

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: 22NCVC-42-01-2013 (overruled).]

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA (majority):

Brief Facts Of The Case

[1] BK Fleet Management Sdn Bhd ("the plaintiff") is a company with its main business of supplying trucks and providing services and maintenance for the vehicles.

[2] Stanson Marketing Sdn Bhd ("the defendant") is a company which is engaged in the business of sales and distribution of bakery goods under the brand "HIGH 5".

[3] The plaintiff and defendant had entered into four trucks supply and services agreements for a period of five years ("the agreements").

[4] According to the agreements, the plaintiff has to provide trucks and services which included maintenance in respect of the trucks. In return, the defendant is to pay the plaintiff a monthly sum.

[5] The details of the agreements are as follows:

No	Agreement entered	Number of trucks	Monthly payment
1	BKF/S/01/06 on 8.6.2006	60	RM 80,520
2	BKF/S/02/06 on 15.9.2006	36	RM 76,320
3	BKF/S/03/06 on 24.11.2007	32	RM 64,480
4	BKF/S/04/06 on 15.1.2007	51	RM 109,140

[6] It was agreed that all the trucks belonged to the plaintiff except trucks under agreement BKF/S/01/06 which will be transferred ownership to the plaintiff upon payment of a nominal token fee.

[7] The defendant had failed to pay the monthly payment as per the agreements. The plaintiff thus, on 25 November 2011 and 21 February 2012 issued a notice of demand to the defendant. The plaintiff also asked for the return of the trucks which were supplied by the plaintiff under the agreements.

[8] The defendant did not attend to the demands made by the plaintiff. Instead, the defendant had obtained a restraining order from the court dated 12 April 2012 to restrain all parties from taking legal proceedings against the defendant including to recover the assets belonging to the defendant. The restraining order was extended *vide* a court order dated 13 July 2012.

[9] Despite the fact that there was an arrangement in respect of payments owed and due by the defendant, the defendant still failed to make payments to the plaintiff. Thus, the plaintiff on 15 January 2013 initiated a suit *vide* writ of summons and statement of claims against the defendant seeking for, among others, an order for the defendant to pay the unpaid amount of RM6,526,218.38 as of 31 December 2012 and the return of the trucks to the plaintiff.

[10] The defendant had filed the statement of defence together with counterclaims to claim, among others, that the plaintiff surrender to the defendant the trucks' registration card and the plaintiff to cancel out its ownership endorsement on the registration card of these trucks.

[11] The High Court on 21 December 2015 dismissed both the plaintiff's claims and the defendant's counterclaims.

The Appeal

[12] Aggrieved with the decision, the plaintiff now appealed against it to the Court of Appeal.

[13] On 25 March 2016, the defendant filed a "Notis Rayuan Balas" (encl. 4a) for the dismissal of its counter-claim and costs which was not awarded by the High Court.

[14] This appeal came before us for hearing on 7 March 2017. The defendant did not appear despite having been duly served. In fact, on 23 January 2017 the defendant's representative, not a lawyer, was present in court. Thus we adjourned the matter to 7 March to enable the defendant to get proper legal representation to prosecute its case in the appeal. On 7 March, no one appeared for the defendant. Such being the case, we had proceeded to strike out the defendant's notice of cross appeal and proceeded to hear the plaintiff. However, the matter was stood down to 9 March 2017 for the plaintiff to respond to some queries we had posed to learned counsel for the plaintiff.

[15] On 9 March 2017, having heard submissions, in a split decision, the majority had dismissed the appeal with no order as to costs. Stating the obvious, the dissenting view of our learned sister Justice Mary Lim, had allowed this appeal. Below are the reasons justifying the view of majority. Parties will be referred to as they appeared in the court below.

The Issue Before Us

[16] As could be seen in the grounds of judgment of the learned trial judge, though there were a few issues identified, the main issue that could determine the outcome of the case for the plaintiff had been the issue pertaining to

validity and enforceability of the four agreements, in the sense of whether they were bad as being against public policy or bad for illegality under the Contracts Act 1950.

The Plaintiff's Submission

[17] Learned counsel submitted that the learned High Court Judge had erred in facts and in law in failing to consider and take into account that the agreements entered between the parties had not contravened with any provisions under the Commercial Vehicles Licensing Board Act 1987 ("the CVLB Act"). The defendant was the registered owner of the trucks as required by the CVLB Act and the plaintiff at all material time was the beneficial owner for all the trucks. It is common in Malaysia where in a hire-purchase arrangement whereby the hirer/owner, hires out a vehicle to a hiree under the hire-purchase arrangement, and that the hiree uses the vehicle to carry his own goods operating under Permit C licence. The hiree, who is not the owner is allowed to operate the vehicle under Permit C licence. Therefore, the learned judge failed to consider that the arrangement between the parties did not contravene any provisions under the CVLB Act and hence s. 24 of the Contracts Act 1950 is deemed not applicable in this situation. Therefore parties were bound by the contracts that they had legally entered into.

[18] It was also contended on behalf of the plaintiff that even if the agreements were found to be void as being illegal, salvation could be had by the plaintiff under s. 66 of the Contracts Act 1950.

[19] There were no submissions made by the defendant before for reasons as alluded to prior.

[20] With respect, we agreed that the appeal turned on the issue of the enforceability of the agreements. To be exact, whether they are caught by the prohibitive injunctions as listed under s. 24 of the Contracts Act 1950.

[21] We reproduce below s. 24 of the Contracts Act 1950 for ease of convenience.

> **Section 24 What considerations and objects are lawful, and what not**
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law,
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.

[22] The essential facts in this case, as found by the learned trial judge, can be stated as follows. The defendant was the owner of all the trucks mentioned in Schedule 2 of each of the four agreements. Indeed, as observed and found by him, s. 2 of the Schedule 1 of all four agreements stated that the owner of the trucks was Stanson Marketing Sdn. Bhd. namely, the defendant in this case. We would have thought that those facts were beyond dispute. What was also beyond dispute is the fact that the plaintiff was the service provider who would provide the fleet management services in respect of all the trucks mentioned in all the four agreements. This was clearly borne out in recital 2 of the agreements. The defendant's part of the bargain was to make monthly payments to the plaintiff as agreed between them.

[23] As it had come to pass, the defendant had failed to pay for the services which had triggered this action by the plaintiff for recovery of the fees for the services rendered.

[24] The learned trial judge, having heard the evidence and having sifted through the evidence, had concluded in paras. [41] and [42] of his grounds of decision as follows:

> [41] Based on the evidence by the Plaintiffs own witnesses, it is inescapable conclusion that in the said 4 Agreements, the Defendant is named as the owner of the trucks to enable the Plaintiff to circumvent the requirement of having to obtain license A as required under section 14(2)(a) of the Act.
>
> [42] This action by the Plaintiff if allowed would certainly defeat the provision of section 14(2)(a) of the Act and also it opposed the public policy. Here there is an intention to use the Agreements for an unlawful purpose. As such the 4 Agreements entered by both parties in this case are void *ab initio* and unenforceable.

[25] In his grounds of judgment, the learned trial judge had referred to a few decided cases of high authority in support of his view that the four agreements were void *ab initio* and were therefore unenforceable.

[26] The learned trial judge had also found that s. 66 of the Contracts Act 1950 was not applicable and that finding resides in para. [51] of his grounds of judgment where he had said:

> In the present case too, the parties were aware of the unlawful purpose of the Agreements and the Plaintiff allows the trucks to be registered under the Defendant's name and signed the said 4 Agreements which states that the Defendant is the owner of all the trucks in order to circumvent the requirement of Section 14(2)(a) of the Commercial Vehicles Licensing Board Act 1987. Therefore, the said Agreements were clearly void *ab initio* and section 66 of the Contract Act 1950 is not applicable.

[27] Premised on the above, the learned trial judge had dismissed the plaintiff's claim against the defendant. Based on the same consideration, as the defendant's counter-claim was premised on the same impugned four agreements, he had dismissed the counterclaim. No costs were given to either party.

[28] To our minds, the issue boiled down to whether, on the facts, as could be deduced from the evidence as led before the learned trial judge, there was a circumvention by both parties of the provisions of the CVLB Act. It was not in dispute that a license was required to be issued under the CVLB Act in order for the parties to carry on its business under the four agreements.

[29] Now, what is circumvention? The CVLB Act does not define what is meant by circumvention. Indeed, there was no need for that as that word does not appear anywhere in the 1987 Act itself. Circumvention is a common word, but a word of significant ramifications, given the context it is being used. According to the Cambridge Dictionary, to circumvent means to avoid doing something, especially cleverly or illegally. As an illustration, it gave as an example, where ships were registered abroad to circumvent employment and safety regulations.

[30] In the context of this appeal before us, the learned trial judge had found that both the parties in this case had acted together in such a manner as to circumvent the provisions of the CVLB Act, pertaining to s. 14(2) on the licensing requirements. In particular, s. 14(2)(a) spells out two types of licences to be issued to users of commercial vehicles. There are two types of licences, one Licence A, and two, Licence C. Licence A is required for a commercial vehicle which is used to carry goods for hire or reward. Licence C is required for a commercial vehicle which is used to carry one's own goods. What had happened in this case, was captured by the learned trial judge in para. [38] in his grounds of judgment, as follows:

> Therefore, it is clear that the Plaintiff is required to obtain license A in order to rent the trucks on hire to the Defendant. The Plaintiff was fully aware of this requirement but explained that it will only increase the monthly rental of those trucks. That is the reason why the Plaintiff allows all the trucks to be registered under the Defendant's name.

[31] We had perused through the notes of evidence and we found that the learned trial judge was correct when he came to the conclusion which he did in para. [38] above. In fact, there was an admission coming from the plaintiff's witness (PW2) where it was actually the intention of both parties that provisions of s. 14(2) of the CVLB Act be circumvented by having the vehicles be registered in the name of the defendant, when in fact, the vehicles belonged to the plaintiff. Such an arrangement would make the business plan between the parties a viable one. We would now refer now to the evidence of SP2.

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11Q: If all the 179 vehicles are belong to the Plaintiff why does the Plaintiff allow all his vehicles to register under the Defendant name?

A: This is because in order for the Plaintiff to rent the vehicle to the Defendant with A permit licence, the monthly rental will be higher.

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[32] The plaintiff was aware of the licensing regime that was in play. The arrangement that was entered into between the parties was a deliberate act actuated, as it were by business consideration of profit and loss, with eyes wide open. SP2 was asked the following question: "You all therefore made a different arrangement between the parties to register those trucks as if they are Stanson Marketing trucks." His answer was telling, "Well, that the only

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way we can do it." In fact, it was not lost on the learned trial judge that the nominal fees to be paid by the plaintiff as can be seen in para. [34] of his grounds of judgment in the following terms:

> The fact that there are clauses in the Agreements which gives the Plaintiff the first right to purchase the trucks upon the expiry of the term of the

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> agreement for a mere RM100 and RM1.00 per vehicle, fortified by finding that the Plaintiff is the beneficial owner of the vehicles and these clauses are to facilitate the transfer of ownership back to the Plaintiff as submitted by the Plaintiff's counsel.

[33] In the circumstances, the learned trial judge had concluded in para.

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[41] in his grounds of judgment that "… the defendant is named as the owner of the trucks to enable the plaintiff to circumvent the requirement of having to obtain licence A as required under s. 14(2)(a) of this Act." The circumvention was done to defeat the express provisions of the CVLB Act.

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[34] Now, having perused through the appeal papers, to our minds, there was clear evidence of circumvention of the provisions of the CVLB Act by both parties. What does the law on this say? The law on this is quite trite. To our minds, the learned trial judge had correctly cited the Privy Council case of *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90; [1960] 1 MLJ 52 where the learned Law Lords had said as follows:

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> The plaintiff Sardana Ali is a lorry driver. In 1948 he wanted to acquire a lorry and use it to carry goods on his own account. But he had no chance of getting a haulage permit as he had never had one before the war. The defendant Sajan Singh was a hauler who had apparently had haulage permit previously and had every chance of getting one. So they

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> came to an arrangement whereby the defendant Sajan Singh was to acquire a second-hand lorry and to register it in his own name and to get a haulage permit for it in his own name, but all the time it was intended that it should belong to the Plaintiff, Sardana Ali and be used by him on his own account.

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[35] On such fact pattern, their Law Lords found that the impugned conduct was against the regulation of the Road Transport Ordinance 1949 and it had amounted to an illegality.

[36] As to what would then happen to the properties involved, the answer to that question was provided by Lord Denning in the same case of *Sajan Singh v. Sardara Ali (supra)* as follows:

> And the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The Court does not confiscate the property because of the illegality – it has no power to do so – so it says, in the words of Lord Eldon: "Let the estate lie where it falls." see *Muckleston v. Brown*.

[37] So would the trucks remain where they have since 'fallen', apparently with the defendant.

[38] As such, we were of the considered view that the learned trial judge did not commit any error in concluding the way he did.

[39] As alluded to earlier, the plaintiff had also advanced the contention that even if the agreements were illegal and therefore void and unenforceable being against public policy, s. 66 of the Contracts Act 1950 ought to be invoked in his favour. For ease of reference, s. 66 of the Contracts Act 1950 provides as follows:

> When an agreement is discovered to be void, or the contract becomes void, any person who received any advantage under the agreement or contract is bound to restore it, or to make compensation for to the person who received it.

[40] As had been alluded to earlier also, both parties had entered into the four arrangements in the agreements deliberately with their eyes wide open. In the circumstances, it cannot be stated by any stretch of imagination that those four agreements "is discovered to be void, or the contract becomes void ..." within the contemplation of s. 66 of the Contracts Act 1950. Again, to our minds, the learned trial judge had correctly cited the Federal Court case of *Singma Sawmill Co. Sdn. Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 in interpreting s. 66 of the Contracts Act 1950. In that regard, we do not wish to add anything to what is essentially settled law, save to just reiterate what was said by Raja Azlan Shah CJM (as His Majesty then was) where he had said:

> The section therefore enacts in statutory form that contract that is illegal in itself is void and unenforceable by either party.

[41] In fact, in 1981 the apex court in the case of *Yeep Mooi v. Chu Chin Chua & Anor* [1960] 1 LNS 169; [1981] 1 MLJ 14 again had occasion to dwell on s. 66 of the Contracts Act 1950 again and the following excerpt appears in its judgment:

> An agreement 'discovered to be void' does not mean that the contract is void on discovery or void because of the discovery of the illegality. It means what it says, in that the contract was void *ab initio* without the parties at the time being aware of the true legal position. It is only later that the contract is found to be void and so they became aware of its voidness.

[42] We noted that on the fact pattern obtaining before them, their Lordships of the apex court were of the view that the appellant before them was entitled to restitution of her monies by the pawnshop which had in fact received unfair advantage from its use. But the same, with respect, could not be similarly applied in favour of the plaintiff before us, on account of the fact pattern as found by the learned trial judge which finding we had no reason to depart from. That being said, we were of the view, therefore, that the plaintiff could not avail itself of the provisions of s. 66 of the Contracts Act 1950.

[43] Further, we agreed with the learned trial judge that the four agreements were caught by s. 24 of the Contracts Act 1950. By way of reiteration, it would be opportune to restate the legal ramifications of s. 24 of the Contracts Act 1950 and we would quote the relevant portion the speech by learned Justice Jeffrey Tan FCJ, in the recent apex court decision in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 as follows:

> ... The provisions of s. 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b), (c), (d) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void.

(See also the case of this court in *Wong Yee Boon v. Gainvest Builders* [2017] 10 CLJ 209; [2017] MLJU 416.)

Conclusion

[44] Premised on the above, we were of the considered view that there was no merit in this appeal. The strong stand taken by our courts on illegal contracts, and by extension contracts that are void by virtue of s. 24 of the Contracts Act 1950, has been consistently clear. This can be seen in the words employed by learned Justice Peh Swee Chin FJ in the case of *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281 as follows:

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex-facie* illegal.

Indeed, my learned sister Justice Dr Badariah had occasion to cite this same quote above in the *Wong Yee Boon v. Gainvest Builders* case *(supra)* by way of reiteration of the important legal principle.

[45] As such, we had dismissed it with no order as to costs. We had also affirmed the decision of the learned trial judge. We ordered the deposit be refunded to the plaintiff, being the appellant before us.

Mary Lim JCA (dissenting):

Introduction

[46] The appellant's claim in the court below was for payment for services rendered to the respondent under four logistics service agreements entered between the parties. Aside from the claim for payment, the appellant sought a declaratory order that it was the beneficial owner of the trucks which had been used to render the services; and for the trucks to be delivered to the appellant.

[47] The respondent disputed the claim and counterclaimed for the appellant to deliver up the registration cards of the trucks in question and for the appellant's withdrawal of endorsement of its ownership claim in the registration cards. The respondent also sought general damages for loss and damage supposedly suffered as a result of the appellant's actions.

[48] Both the claim and the counterclaim were dismissed by the learned judge on the single finding that the four agreements were void *ab initio* as these agreements were said to have been for the unlawful purpose of circumventing s. 14(2)(a) of the Commercial Vehicles Licensing Board Act 1987. The appellant appealed and the respondent cross-appealed. At the first hearing of the appeals, the respondent failed to attend court.

[49] The hearing nevertheless proceeded and after hearing learned counsel for the appellant, this court caused for further submissions on s. 24 of the Contracts Act 1950. At the second hearing, by a majority decision, the appeal was dismissed. This is my dissenting judgment.

Background

[50] The appellant's principal business is providing fleet services and maintenance for vehicles. The respondent's principal business is the sales and distribution of bakery goods under the brand of "High 5". From 8 June 2006 to 15 January 2007, the parties entered into four "fleet management

services" agreements covering the provision of fleet management services for a total of 179 trucks used by the respondent in its distribution of its "High 5" branded labels. Generally, those agreements are as follows:

8 June 2006:	the appellant to provide "fleet management services" for 60 units of trucks and to maintain the same and for which the respondent agrees to pay the sum of RM80,520 per month for the same for a period of 60 months, that is, until 8 June 2011 (first agreement).
15 September 2006:	the appellant to provide "fleet management services"; and to assist the respondent in the purchase of 36 units of trucks for which the respondent agrees to pay the sum of RM76,320 per month for a period of 60 months, that is, until 14 September 2011 (second agreement).
24 November 2006:	the appellant to provide "fleet management services"; and to assist the respondent in the purchase of 32 units of trucks and to maintain the same and for which the respondent agrees to pay the sum of RM68,480 per month for a period of 60 months, that is, until 23 November 2011 (third agreement).
5 January 2007:	the appellant to provide "fleet management services"; and to assist the respondent in the purchase of 51 units of trucks and to maintain the same and for which the respondent agrees to pay the sum of RM109,140 per month for a period of 60 months, that is, until 14 January 2012 (fourth agreement).

[51] The fourth agreement had a supplemental agreement where it was *inter alia* agreed as follows:

(i) that the appellant has 'legal and equitable lien' over the trucks;

(ii) the respondent is to use and hold the legal title to the trucks on trust for the appellant until the respondent exercises its call option to transfer title to the trucks to the appellant;

(iii) in the event of a default by the respondent, the appellant was entitled to enter the premises of the respondent and seize ownership of the trucks.

[52] The registration cards to all the trucks were kept with the appellant as it saw to the annual renewal of road tax of the trucks. According to the appellant, when the respondent defaulted in the repayments under all four agreements, the parties met several times on 10 March 2011, 27 May 2011, 21 July 2011 and 18 August 2011 to discuss the respondent's repayment of the outstanding amounts to the appellant. It was agreed that all four agreements would be extended for one year on the same terms and conditions as the original agreements and as follows:

(i) first agreement: extended to 7 September 2012 at the rate of RM1,819 per truck;

(ii) second agreement: extended to 14 September 2012 at the rate of RM1,802 per truck from September 2011 to August 2012;

(iii) third agreement: extended to 23 November 2012 at the rate of RM1,819 per truck from November 2011 to October 2012;

(iv) fourth agreement: extended to 14 January 2013 at the rate of RM1,819 per truck from January 2012 to December 2012.

[53] Despite the agreements, the respondent failed to pay for the services rendered and is said to continue using the trucks under the four agreements. Sometime in 2012, the appellant decided not to renew the road tax for the trucks and the respondent then approached the Road Transport Department for new registration cards to be issued. New cards were issued but these bore endorsements by the appellant. The appellant then 'dispossessed' eight trucks on 11 April 2012 and 12 April 2012. These eight trucks were subsequently returned to the respondent as part of the terms of leave granted by the High Court to enable the appellant to commence proceedings against the respondent as by this time, the respondent had obtained a restraining order under s. 176 of the Companies Act 1965.

[54] The appellant's claim, filed in January of 2013, is for the total sum of RM6,526,218.38 as at 31 December 2012 together with a further sum of RM248,761 being arrears in payment for services rendered and for monthly rentals for the trucks from 1 January 2013 till the trucks are returned to the appellant. The appellant also sought an order declaring that it is the beneficial owner of the trucks and consequently, for the return of the trucks to the appellant.

[55] The respondent's defence is on two fronts: the ownership of the trucks and the payment for services rendered. In respect of the ownership, the respondent claimed that it is the owner of all the trucks specified in the schedules to the four agreements and that almost all of the trucks in question are registered in its name. According to the respondent, cl. 10 of the first agreement only gave the appellant a first right or option to purchase the

trucks upon completion of the first agreement for the consideration of RM100 per truck. As for the remaining three agreements, cl. 9 gave the appellant a similar option but this time, at RM1 per truck. The respondent further claimed that at the time of the filing of the claim, the options were not exercisable yet by the appellant. Consequently, the appellant was not entitled to the reliefs sought. Alternatively, the respondent pleaded that the options were void for want of consideration.

[56] Yet another alternative defence was that the trucks were utilised to carry the respondent's goods for which the appellant was prohibited from providing the fleet services or supplying the trucks for hire without first obtaining the requisite carrier and/or operator licence issued under the Commercial Vehicles Licensing Board Act 1987 and/or Land Public Transport Act 2010. Since the appellant did not have those relevant licences, the first right or options were tainted with illegality, unlawful and unenforceable. For the same reasons, the appellant's claim of an equitable lien and trust over the trucks are disputed.

[57] Insofar as payment for the services rendered is concerned, the respondent claimed that it had paid up; and that the appellant was not entitled to payment due to *inter alia* the quality of services rendered, that it was unsatisfactory, inadequate and/or inconsistently rendered.

[58] The respondent counterclaimed seeking for the removal of the appellant's endorsements on the registration cards of the trucks; return of the original registration cards, and for loss and damage due to the wrongful dispossession of the eight trucks and for disruption to its business on account that it was unable to use the trucks.

Decision Of The High Court

[59] The issues before the High Court were:

(i) whether the four agreements were tainted with illegality and therefore void and unenforceable;

(ii) whether the appellant was the beneficial owner of the trucks;

(iii) whether the appellant's claim was proved; and,

(iv) whether the counterclaim was proved.

[60] After a full trial, the High Court not only found the appellant to be the beneficial owner of the vehicles but also found the four agreements to be void under s. 24 of the Contracts Act 1950. The learned judge further declined to invoke s. 66 of the Contracts Act 1950 taking the view that the relief was not available to the appellant as it is said to have been aware that the agreements were for an unlawful purpose, and that such unlawful purpose was in fact carried out. Therefore, the appellant was precluded from

obtaining any aid from the court. For these reasons, the learned judge opined that the appellant failed to prove its claim. The claim was consequently dismissed. As for the counterclaim, the learned judge found that since the respondent also participated in the void agreements, the counterclaim was dismissed for the same reasons.

Dissenting Judgment

[61] The primary argument before the Court of Appeal is the same issue of illegality and whether s. 24 of the Contracts Act 1950 is breached in the particular facts and circumstances.

[62] As mentioned earlier, the learned judge had answered in the positive finding the four agreements to be void and unenforceable under ss. 24 and 2(g) of the Contracts Act 1950. His Lordship found that a user of a commercial vehicle defined under the Commercial Vehicles Licensing Act 1987 is required to obtain a licence from the authorities to carry goods. The type of licence which is to be procured depends on whether the vehicle is used to carry goods for hire or reward; or is it used to carry one's own goods. Where it is the former, then a carrier licence 'A' is required whilst in the case of the latter, a carrier licence 'C' is required.

[63] According to the learned judge, the appellant was required to obtain carrier licence 'A' in order to rent the trucks on hire to the respondent. The appellant was said to be fully aware of this requirement but because it will only increase the monthly rental of the trucks, the trucks were then registered in the respondent's name where a carrier licence 'B' is required. The learned judge said that "based on the evidence of the plaintiff's own witnesses, it is inescapable conclusion that in the said four agreements, the defendant is named as the owner of the trucks to enable the plaintiff to circumvent the requirement of having to obtain licence A as required under s. 14(2)(a) of the Act."

[64] In my considered view, that finding and conclusion are wrong both in law and on the facts. To start with, the facts and for this, a proper appreciation of the factual contractual relationship between the parties is called for.

[65] First, the business of the appellant. According to the recitals in the four agreements, the appellant is a service provider and it carries out the business activity of *inter alia* providing fleet management services for vehicles which are owned by individuals and other companies. At recital B of the second, third and fourth agreements, it further states that the appellant has assisted the respondent, described as "owner" of the vehicles (in this case, trucks) to procure and purchase the vehicles described in Schedule 2 to the respective agreements. This is not controverted by the parties in evidence

before the trial court. This, therefore, shows that the appellant provides fleet services which include maintenance of the fleet or trucks; but the trucks do not belong or are they owned by the appellant. The trucks belong to individuals or other companies, including the respondent.

[66] Learned counsel for the respondent had in fact cross-examined PW1 extensively on this point with a view to establishing and impressing its argument that the appellant could not possibly be owners of the trucks given the recitals in the four agreements. I shall return to this shortly but for now, it is necessary to clear up on an observation of the learned judge in the grounds of judgment. At para. 32 thereof, the learned judge appears perturbed by the suggestion of the respondent, as owner, renting its own trucks:

> … if the trucks were rented to the defendant, the defendant certainly cannot be the owner of those trucks.

[67] It would appear that there is a misapprehension on the part of the learned judge, that the 'rent' referred to in the email necessarily refers to the rentals of the trucks. With respect, that is not quite so. Having appreciated the relationship between the parties, the "rental" mentioned in SD1's email of 26 August 2011 which was sent to the appellant is, in fact, in respect of the payment or hire of the fleet services or fleet management services, and not the trucks themselves. The details of the services are to be found in Schedule 3 to each agreement and it refers to matters such as the obligation to provide a 24-hour call assistance; breakdown services or accident and towing facility; and preventive and corrective maintenance and inspection.

[68] This brings up the next misapprehension of a material matter, the question of ownership of the trucks, a point that I touched on just a moment ago. Now, at no time did the appellant claim legal ownership of the trucks; it only claimed beneficial ownership and this is only by reason of the rights option under the four agreements – see paras. 4 to 8 of the amended statement of claim. The appellant claims that this right or option at the conclusion of the agreements gives rise to the existence of a trust, that the respondent holds these trucks on trust for the appellant till the appellant exercises those options. Meanwhile, and until such time, the appellant asserts a legal or equitable lien over the trucks. So, if the respondent acted in any way to deprive the appellant of that agreed right or option, which incidentally is not disputed by the respondent save to say that the right to exercise the option was not available yet at the time the action was filed; the appellant claims a right to enter and repossess the trucks. It is on that understanding and explanation that the trust and claim of any right over the trucks is asserted.

[69] On the matter of beneficial ownership of the trucks, the learned judge examined the oral evidence and various pieces of evidence and found that the appellant "is the beneficial owner of all the trucks under the agreements". The learned judge found that all four agreements provide that the respondent is the owner of the trucks in question while the appellant is the provider of fleet services as detailed in Schedule 3 to the respective agreements.

[70] In my view, the learned judge was entirely correct to find that all 179 trucks under the four agreements are indeed, registered to the respondent's name even though the trucks carried different endorsements. The 60 trucks under the first agreement carried the endorsements by AmBank (M) Bhd pursuant to hire purchase facilities taken by the respondent – see pp. 663 to 780 of R/A 4/5 while the registration cards of the remaining trucks were endorsed with the appellant's name. Together with the first right or option terms in the four agreements, this was to evidence the existence of the appellant's beneficial ownership over all 179 trucks. So, the learned judge was correct in concluding that the appellant is the beneficial owner of the trucks.

[71] After dealing with the matter of beneficial ownership of the trucks, the High Court then posed itself this question as to why the appellant allowed the trucks to be registered in the respondent's name and signed all four agreements clearly stating the respondent is the owner of the trucks – see para. 35 of the grounds of judgment. It is in answering that poser (paras. 36 to 47) that the learned judge concluded that the agreements were all void and unenforceable under s. 24 of the Contracts Act 1950.

[72] With respect to the learned judge, this is where I believe he has erred. As far as the pleaded claim is concerned, the legal ownership of the same trucks was never in issue. That aspect was actually brought up by the respondent to respond to the appellant's claim of a lien and a trust in respect of the trucks. The respondent suggested in its defence that if the appellant had legal ownership and if it was the owner of the trucks, then, the appellant's name should appear in the registration cards. Since the registration cards do not bear the appellant's name but instead, the respondent's name appears in all the registration cards, the appellant's claim of a lien or a trust could not stand. This is evident from paras. 4(d) and (e), and 5(e) and (f) of the re-amended defence filed in response to paras. 4 to 8 of the amended statement of claim. Paragraphs 5(e) and (f) warrant setting out:

> (e) Further and/or in the alternative, the defendant states that the trucks are utilised for the carriage of goods of the defendant. In this regard, the defendant further states that the plaintiff is prohibited from supplying the trucks for hire to the defendant as alleged (which is denied) without first obtaining the requisite carrier's licence and/or operators' licence under the Commercial Vehicles Licensing Board Act 1987 and/or Land Public Transport Act 2010, respectively.

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> As such, if the Options and First Right are merely to give effect to the plaintiff's allegedly ownership of the trucks (by reason of having allegedly supplied the trucks for hire to the defendant) the Options and First Right are tainted by illegality as the plaintiff does not have the requisite carrier's licence and/or operator's licence in contravention of the Commercial Vehicles Licensing Board Act 1987 and/or Land Public Transport Act 2010.

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> (f) In such circumstances, the Options and First Right (and any alleged consideration provided by the plaintiff in respect thereof, if at all and which is denied) is unlawful and therefore unenforceable.

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[73] The above pleadings also show that the respondent's argument is that if the appellant is the legal owner, which the respondent disputes, the appellant is obliged under s. 14(2)(a) of the Commercial Vehicles Licensing Board Act 1987, to obtain a licence 'A' carrier licence instead of a licence 'C' that it had. Thus, as far as the respondent was concerned, the appellant is never the legal and registered owner of all 179 trucks and the respondent

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had pleaded like so; as well as testifying to that effect. The respondent's defence is that it and it alone, is the legal and registered owner. The existence of a licence 'C' carrier licence was intended to fortify the respondent's claim.

[74] While that was the pleaded case, what had happened was in the course

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of trial, two of the appellant's witnesses, PW1 (Victor Tan Seang Hin) and PW2 (Ng Kok Leng), testified in their evidence in chief that the trucks were all bought by the appellant but were registered in the respondent's name. PW1 further testified that 17 of the 179 trucks were in fact registered to the appellant's name. Both witnesses told the court that the appellant allowed the trucks to be registered in the respondent's name (see pp. 4 and 10 of R/A1/2):

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> This is because in order for the plaintiff to rent the vehicle to the defendant with A permit licence, the monthly rental will be higher.

[75] The respondent disputed this and its counsel cross-examined both PW1 and PW2 extensively on this point. As alluded to earlier, learned

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counsel for the respondent challenged that this cannot and was not the true position at all; that it was the respondent and not the appellant who was at all times the legal and registered owner of all 179 trucks. In fact, DW1, the respondent's sole witness testified to this effect, claiming that the trucks were bought from the appellant by the respondent's holding company, Silver Bird

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Group Berhad, under a procurement agreement in 2004. Although this piece of evidence was itself challenged by the appellant, the fact remains that the respondent's contention, as pleaded and testified, was that the trucks were never the appellant's and it gave evidence to this effect. The trucks therefore belong to the respondent.

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[76] Having taken this position, it is not open to the respondent to submit a different and more significantly, an inconsistent line of argument, that is to say that the trucks are the appellant's who should then have obtained a licence 'A'. Unfortunately, that submission was not only allowed but accepted by the court below. The respondent did not appear in the appeal before us, and we were not able to clarify on the same. Be that as it may, it is my considered opinion that the respondent cannot resile from the positions pleaded and testified. A decision reached under such circumstances is unjust and must therefore, be corrected by this court.

[77] Consequently, I find it difficult to support the learned judge in his findings and conclusions; particularly after the learned judge had accepted and relied on documentary evidence showing that the trucks were indeed registered to the respondent. Any suggestion to the contrary should not have been entertained as that was not the pleaded case of any of the parties. The allegations of illegality, as identified and pleaded by the respondent, was on the alternative proposition that if the appellant's claim of ownership was to be true, then the appellant would have been required to obtain a licence 'A' instead of the licence 'C' that the appellant supposedly had.

[78] This is not a case of *ex facie* illegality where the court quite rightly may address and deal with the complaint at any time or stage of the proceedings, including at the appeal – see *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619. The illegality is as pleaded at paras. 5(e) and (f), that the registration in the respondent's name and thereby the "options and first right" could not have been "merely to give effect to the plaintiff's allegedly ownership of the trucks"; the registration was a record of the truth and the options an agreed term of the agreements to be exercised at the appropriate time, which time had yet to arise at the time of the filing of the action.

[79] Hence, when the learned judge concluded that the four agreements were void and unenforceable due to violations of s. 14(2)(a) of the Commercial Vehicles Licensing Board Act 1987 and thereby s. 24 of the Contracts Act 1950, the learned judge had plainly erred on the facts and the pleaded case of the respective parties, which pleadings bind the parties and defines the matters under consideration by the court. This error alone is sufficient to merit intervention by the appellate court.

[80] I am aware that the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay bin Abdullah (supra)* had held that the court is "bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded, and to refuse to enforce the contract. In that regard, we accept the statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in *China Road & Bridge Corp & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLJ 1 …" Similar views were expressed by the Court of Appeal in *Thong Foo Ching v. Shigenori Ono* [1998] 4 CLJ 674; [1998] 4 MLJ 585 where the Privy Council decision of *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd*

& Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457 was cited; that "the illegality of an agreement sued upon is a matter of which the court is obliged, once it is appraised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see eg, *Edler v. Auerbach* [1950] 1 KB 359) for clearly, no court could knowingly be party to the enforcement of an unlawful agreement."

[81] However, aside from the reasons already set out, the facts as well as the operation of s. 14(2)(a) of the Commercial Vehicles Licensing Board Act 1987, do not support the conclusion reached by the learned judge, that the agreements which are before the court for enforcement are at all, unlawful.

[82] On the law, the learned judge has also seriously erred. While the learned judge may have set down the principles on ss. 2, 10 and 24 of the Contracts Act 1950 in general terms, His Lordship had not considered or applied the principles adequately or correctly. The same may also be said of s. 14(2)(a) of the Commercial Vehicles Licensing Board Act 1987. The learned judge similarly did not properly or adequately consider the meaning and operation of s. 14(2)(a).

[83] At para. 26, the learned judge had said:

> It seems that all the requirements for a valid contract has been satisfied except on the issue of whether these agreements are tainted with illegality. On this issue, the evidence of the plaintiff's own witnesses has revealed the evidence that assist me to make a finding.

[84] The learned judge set out at paras. 39 and 40 the evidence of PW1 and PW2 on the licence requirements before concluding at para. 41 that the respondent was named as owner to enable the appellant to "circumvent the requirement of having to obtain licence A as required under s. 14(2)(a) of the Act." It was the learned judge's view that "this action by the plaintiff if *(sic)* allowed would certainly defeat the provision of s. 14(2)(a) of the Act and it opposed the public policy. Here there is an intention to use the agreements for an unlawful purpose. As such, the four agreements entered by both parties in this case are void *ab initio* and unenforceable."

[85] Sections 10 and 24 of the Contracts Act 1950 provide that:

> 10. All agreements are contract if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
>
> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person property of another; or
>
> (e) the Court regards it as immoral, or opposed to public policy.

[86] In the interpretation of any agreement, the court has frequently reminded itself that its duty is to give effect to the bargain of the parties according to their intention as discerned from the evidence, especially where the agreement is in writing – see the Court of Appeal's decision in *Mulpha Pacific Sdn Bhd v. Paramount Corp Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ 357. In the present written agreements, the intention of the parties and the terms and conditions are actually not in dispute. The court must therefore give effect to them, giving it a "commercially sensible construction" – see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2009] MLJU 982.

[87] It is quite clear from the terms and conditions of the four agreements that the respondent had contracted with the appellant for the provision of fleet management services involving a total number of 179 trucks for the purpose of carriage of its goods – see in particular, cls. 2, 3 and 4 of the agreements. These four agreements, which were unquestionably renewed, were for various periods, and involved different trucks and at different costs. The object of each of the four agreements is clearly for the provision of fleet management services; the consideration in each agreement is the payment of certain sums of money. These objects and consideration are without doubt, lawful and do not fall within any of the five circumstances stipulated in s. 24 of the Contracts Act 1950 which may render the agreements unlawful, void and unenforceable. The agreements to provide fleet management services are perfectly valid and lawful.

[88] The matter or issue of the carrier licence under the Commercial Vehicles Licensing Board Act 1987, what class or type is appropriate or even applicable are but incidental matters which form no part of any of these agreements. Such matters, like for example, the identity of the drivers of the trucks, the type of goods or even tonnage to be carried, do not affect the subject matter and core of the agreements. The agreements remain fundamentally, agreements between these two parties on the carriage of the respondent's goods.

[89] The agreements are not at all, agreements concerning licences under the Commercial Vehicles Licensing Board Act 1987 or even about the type of licences to be obtained for the 179 trucks. The agreements are simply about provision of fleet management services. The object, consideration and subject matter of all four agreements are not prohibited by s. 24 of the Contracts Act 1950, including the 11 illustrations to s. 24. If the agreement be unlawful, it is well-established that the court never lends its aid to any of the parties to such an agreement, be it the claimant or the defendant – see the Supreme Court's decision in *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281. But, in ascertaining whether any agreement is illegal under s. 24, care should be taken to properly examine the facts and the law.

[90] The facts presented here are entirely different and distinguishable from those in *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90; [1960] MLJ 52; *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] MLJ 143 or even *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay bin Abdullah (supra)*. In all these cases, the object and purpose of the agreements were clearly unlawful. In *Sarjan Singh v. Sardara Ali*, the agreement was for the defendant, Sarjan Singh, to acquire a second-hand lorry and to register it to his name. Thereafter, the defendant was to get a haulage permit which the plaintiff had no chance of securing. All this was to enable the plaintiff to use the lorry and carry his own goods. Such an agreement was against the regulation of the Road Transport Ordinance 1949 and held to be void.

[91] In *Palaniappa Chettiar v. Arunasalam Chettiar*, the agreement between father and son was one where the father transferred 40 acres of his land to his son in order to avoid the operation of the Rubber Regulations 1934. Those Regulations required anyone who held 100 acres or more to be assessed by an Assessment Committee. When the father sought the return of the 40 acres, the claim was dismissed on the ground of illegality.

[92] In the recent Federal Court's decision of *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay bin Abdullah (supra),* the agreement sought to be enforced was one to provide services to influence the decision of a public-decision maker to award a contract. The Federal Court found such an agreement to be one which is opposed to public policy as defined under s. 24(e) of the Contracts Act 1950 and therefore void.

[93] Consequently, I cannot see how the learned judge could have arrived at the decision that the four agreements are void and unenforceable because the object or consideration is unlawful under s. 24 of the Contracts Act 1950.

[94] In any case, even accepting that there is illegality here for the sake of argument, which I do not find to be the case, be it in law or on the facts; I find that the defence is not sustainable. The respondent has not pleaded specifically in its defence how the "illegality" offends s. 24 of the Contracts Act 1950; whether it is because it is forbidden by a law; whether it is of such a nature that, if permitted, would defeat any law; whether it is fraudulent; or even if it is opposed to public policy.

[95] These are the relevant provisions of the Commercial Vehicles Licensing Board Act 1987, in particular s. 14(2)(a):

> 14(1) Public service vehicles shall be divided into and licensed under the following classes:
>
> (a) stage buses;
>
> (b) charter buses;
>
> (c) express buses;
>
> (d) mini buses;

(e) employees buses;

(f) feeder buses;

(g) school buses;

(h) hire cars;

(i) hire and drive cars;

(j) taxi cabs;

(k) airport taxi cabs; and

(l) limousine taxi cabs.

(1A) Notwithstanding subsection (1) the Minister may make rules for the purpose of prescribing any other classes of public service vehicles as he thinks fit.

(2)(a) Goods vehicles shall be divided into and licensed under the following classes:

(i) carrier's licence 'A'; and

(ii) carrier's licence 'C'.

(b) Goods vehicles of either class may be of different types in respect of their functions.

(3) A carrier's licence 'A' shall entitle the holder thereof to use the authorised vehicle for the carriage of goods for hire or reward for or in connection with any trade or business carried on by him as a carrier of goods.

(4) A carrier's licence 'C' shall entitle the holder thereof to use the authorised vehicle for the carriage of his own goods for or in connection with any trade or business carried on by him, but it shall be a condition of the licence that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward other than goods sold and delivered by the holder under a contract of sale where a charge is made for the delivery of the goods.

[96] I do not find in s. 14 or 14(2)(a) in particular, any reading which suggests that the object or purpose intended under the four agreements, which is to provide fleet management services, is forbidden. I also do not find, on any proper construction and interpretation of that provision, that the nature of the four agreements was such that if the agreements were to be permitted, s. 14(2)(a) would be defeated. Certainly, I cannot find any presence of fraud or anything in the four agreements, to suggest that the agreement to provide the fleet management services opposes public policy. This is quite aside from the fact that there was no evidence on what exactly that public policy might be. When it comes to allegations of illegality in the sense that the object is against public policy, there must be some cogent evidence of what that public policy is.

[97] When the testimonies of PW1 and PW2 are properly examined, it shows that both of them were referring to the cost of monthly rental being higher if the appellant were to rent to the respondent vehicles with licence A. How that offends, if at all, s. 14(2)(a) is not at all clear. There is certainly no evidence from the respondent or even some witnesses from the Commercial Vehicle Licensing Department on how getting a licence C instead of licence A breaches or offends public policy, or is against s. 14(2)(a).

[98] Furthermore, s. 34 of the Commercial Vehicles Licensing Board Act 1987 requires a goods vehicle to be licensed. Whether it is licence 'A' or 'C', the trucks must be licensed before the trucks may be used and it is incontrovertible that the trucks did have licences. These licences attach to the trucks and not to the persons, including the parties before us. So long as the trucks are issued with a carrier licence under s. 14(2)(a), the trucks may be used. Since the trucks bear licences 'C', not only is this consistent with the terms of the agreements, which is for the appellant to carry the respondent's goods using the respondent's own trucks; it is also in compliance with the 1987 Act, which is that there must be a valid licence before the trucks carrying goods are on the road.

[99] I further observe that the appellant is making a claim of ownership of the trucks at the end of the agreements, and not before. It is only when the agreements are spent that the first right or options arise for the appellant's exercise. Until then, the issue of ownership is a non-issue.

[100] The decision of the Federal Court in *Theresa Chong v. Kin Khoon & Co* [1976] 1 LNS 165; [1976] 2 MLJ 253 is highly relevant and applicable to the present facts. In that appeal, the appellant was found liable to pay the respondent a sum of $35,330.25 being the amount due under a series of share dealings between the parties. The first instance judge had found that the appellant had acted as a remisier for the respondent although she was not registered with the Stock Exchange as such. Despite that non-registration which was a violation of the rules of the Stock Exchange, the learned judge held that the contract was valid and not illegal as being contrary to public policy. Before the Federal Court, it was contended that the High Court should have found the contract to be illegal and void and/or alternatively, that the court would not assist a plaintiff in enforcing a contract which contravened the rules of the Stock Exchange.

[101] In dismissing the appeal, the Federal Court recognised that "where it appears from the evidence during the hearing of a case that the contract sued on is contrary to public policy it is the duty of the judge to take the objection that contract is illegal and void. The cases of *Scott v. Brown, Doering, McNab & Co* and *Montffiore v. Menday Motor Components Co Ltd* were cited in support of this submission." However, when it comes to illegality on the basis of public policy, the Federal Court said:

On the question of what is contrary to public policy, counsel for the appellant cited to us a number of English cases. I do not consider it necessary to deal with them, because in my judgment they do not hold the appellant as would appear from the following passage from the judgment of Asquith LJ in *Monkland v. Jack Barclay Limited*:

> Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion – for example, marriage brokerage contracts, contracts for the sale of honours, contracts in unreasonable restraint of trade and so on. The Courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the Courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest: see, for example, the language of the House of Lords in *Fender v. St. John-Mildmay*.

[102] The Federal Court further held as follows:

> For the Court to take cognizance of illegality the transaction must be illegal on the face of it. Not being registered as a remisier is not contrary to public policy because the bye-laws of the Stock Exchange are the bye-laws of a private body which have no force of law. They are binding on the plaintiffs but not on the defendant. If the plaintiffs were dealing with an unregistered remisier they were committing a breach of byelaw 97 of the Stock Exchange Rules which provide for a penalty. But their dealing with such a remisier did not make the contract illegal as being opposed to public policy.

[103] Although the categories or scope of public policy under s. 24 have not been defined, the Federal Court in *Merong Mahawangsa*, said at p. 231 (CLJ); p. 640 (MLJ):

> [42] It should also be said that public policy is not static. 'The question of whether a particular agreement is contrary to public policy is a question of law… It has been indicated that new heads of public policy will not be invented by the Courts for the following reasons … However, the application of any particular ground of public policy may vary from time to time and the Courts will not shrink from properly applying the principle of an existing ground to any new case that may arise … The rule remains, but its application varies with the principles which for the time being guide public opinion' (*Halsbury's Law of England*, (5th Ed Vol 22) at para 430).

[104] The Federal Court recognised that new heads of public policy will not be invented; but the court must be ready to properly apply the principles to factual circumstances when the same present themselves. In that application, I believe heed must also be given to the caution advised by the Federal Court in *Theresa Chong*. The Federal Court, citing *Cheshire and Fifoot's Law of Contract* said at p. 256:

> First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.
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> Secondly, even though the contract is one which *prima facie* falls under one of the recognised heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case, "should only be invoked in clear cases in which the harm to the public is substantially incontestable. And does not depend upon the idiosyncratic inferences of a few judicial minds … In popular language … the contract should be given the benefit of the doubt.

[105] In the present facts of the appeal, the court is in no position to say, let alone, consider that the procurement of a licence which is different from that which the respondent claims should have been obtained, has caused harm, whether in the form of some revenue loss or other to the Commercial Vehicle Licensing Board or some relevant authority. That requirement of the presence "substantially incontestable" harm to the public is not satisfied here; the court would be speculating on that negativity; a task which the court must never attempt to embark. Even the testimony of the appellant's witnesses do not shed light on the issue. The witnesses were explaining about their business and commercial costs of doing business, not about the costs of the licences.

[106] In my opinion, where the legislation affords a choice of licences, it is open to contracting parties to arrange their affairs and business dealings within the parameters of those options. Having made available choices, it would seem somewhat peculiar for it to be said that the arrangement is unlawful and unenforceable, without more. Surely some evidence from the authorities should have been led, especially to explain the operations and costs of the licences and at least to explain the policy behind the provisions. There was none, and the court should be cautious to presume or conclude, especially since it is understood that these are the regular and frequent arrangements for commercial vehicles under hire-purchase arrangements. The registration cards in those cases bear the name of the buyer but the beneficial ownership of the vehicles is claimed by the financial institution. Class 'C' licences are obtained in those cases. By the terms of s. 14(2), it would appear that what is required under the law is that there must be a licence before a vehicle may carry goods on the public roads. Whether that licence is licence 'A' or 'C' is up to the particular arrangements between contracting parties, so long as the vehicle carrying goods is licensed to do so before it embarks on a journey.

[107] The remarks of the Court of Appeal in *Thong Foo Ching & Ors v. Shigenori Ono (supra)* on the operation of guidelines are also useful though in this case, it is the application and operation of substantive legislation. In *Thong Foo Ching*, the respondent had entered into two sale and purchase agreements; the first was in respect of a purchase of two pieces of land whereas the second was for the sale and purchase of the appellants' entire shareholding in a company to the respondent. The sales were interrupted by an interim order of injunction obtained by a third party restraining the third appellant from dealing with the properties on the ground that there was a three-year tenancy agreement with the third appellant. The respondent also discovered that there was a development order and a decontrol order over the properties issued by City Hall which the respondent claimed were not disclosed to him at the material time of the purchases. The respondent consequently rescinded the agreements and demanded repayment of all monies paid. One of the issues raised concerned the contention that the agreements were contrary to public policy or tainted with illegality and are thus null, void and unenforceable because it was a scheme entered into to circumvent Foreign Investment Committee's approval to purchase the properties; and also the Real Property Gains Tax Act 1976 and the Stamp Act 1949.

[108] On the matter of the guidelines, the Court of Appeal found that the guidelines had no force of law and were only advisory in character. The non-compliance of these guidelines did not carry penal sanctions, and were moral in nature. The non-compliance of the guidelines therefore did not render the agreements invalid and unenforceable. The same however, could not be said of the RPGT Act and the Stamp Act.

[109] I have drawn comparisons with this part of the decision in *Thong Foo Ching* because of the provisions of the 1987 Act. The Act requires that there must be a licence of the relevant class before the vehicle may be on the road carrying the respondent's goods. Since there are valid licences issued to the trucks in question, and it can only be licence 'C' since the respondent is the registered owner of the trucks, the matter of which of two classes is a matter of implementation and arrangement of the logistical details. Without the substantially incontestable evidence that only licence A should have been obtained, the four agreements must be given the benefit of the doubt.

[110] In further support of the above view and approach is the recent decision of the Supreme Court of England and Wales in the case of *Patel (Respondent) v. Mirza (Appellant)* [2016] UKSC 42. In this decision, the Supreme Court examined this same issue of what, in essence, is the common law doctrine of illegality on grounds of public policy in extensive detail. Although s. 24 of the Contracts Act 1950 is relied on to cite invalidity of contract due to void or unenforceable considerations, including reliance on

A the ground of public policy, I have not found s. 14 or any other provision of the Act in question as carrying the implications of illegality relied on. On the contrary, I find that the parties in fact were arranging their affairs to comply with as opposed to contravening the law. The appellant was endeavouring to comply with the law, to still ensure that a carrier licence is B obtained and not, that the requirement of a carrier licence is avoided.

[111] When dealing with arguments of illegality by reason of public policy, as is one of the considerations here, a proper understanding and appreciation of the law applicable to the issue, is first required. These observations and concerns were expressed in *Patel (Respondent) v. Mirza (Appellant).*

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[112] Lord Toulson wrote the main judgment which was agreed to by Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge. His Lordship explained that public policy underlies Lord Mansfield's maxim that "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act" uttered in the case of *Holman v. Johnson* [1775] 1 Cowp 341, 343. That D maxim expressed two centuries ago was then traced in Lord Toulson's judgment to the present position. Lord Toulson discussed the law on the same in Australia, Canada and the United States, with a view to examining the issue of whether the maxim "precluded a party to a contract tainted by illegality from recovering money paid under the contract from the other E party under the law of unjust enrichment (to use the term now generally favoured by scholars for what used previously to be labelled restitution and, before that, *quasi*-contract). On one side, it is argued that the maxim applies as much to such a claim as to a claim in contract, and that the court must give no assistance to a party which has engaged in any form of illegality. On F the other side, it is argued that such an approach would not advance the public policy which underlies Lord Mansfield's maxim, once the underlying public policy is properly understood."

[113] At paras. 99 and 101, Lord Toulson made the following observations on how the court is to determine the issue:

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> 99. Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the H left hand what it takes with the right hand.
>
> 100. …
>
> 101. … So how is the Court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by I illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without *a) considering the*

underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim; and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy, that trio of necessary considerations can be found in case law. (emphasis added)

[114] At para. 120, Lord Toulson further reiterated the above principles in stronger terms:

120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim is to do so would be harmful to the integrity of the legal system (or, possibly, certain aspect of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary *a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose would be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be proportionate response to the illegality, bearing in mind that punishment is a matter of the criminal courts.* Within that framework, various factors may be relevant, but it would be a mistake to suggest that the Court is free to decide a case in an undisciplined way. *The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.* (emphasis added)

[115] In agreeing with Lord Toulson, Lord Kerr added:

143. Lord Toulson's solution to this question also permits readier access to investigation of the traditional justifications for the *ex turpi causa* maxim – preservation of the integrity of the legal system and preventing profit from wrongdoing.

[116] Consequently, in considering whether contracts such as the four agreements here are void for violations of public policy or are against public policy in the terms already discussed, the court ought to bear in mind the following:

(i) the underlying purpose of the prohibition which has been transgressed;

(ii) consider conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim; and

(iii) to keep in mind the possibility of overkill unless the law is applied with a due sense of proportionality.

[117] I have undertaken the approach and considerations opined by the Law Lords in this present appeal and with respect, cannot find the considerations expressed in *Patel (Respondent) v. Mirza (Appellant)*, met on the facts. To start with, I cannot find in the terms of s. 14 a prohibition. What s. 14 seeks to provide is the requirement and possession of a valid carrier licence. What

may be inferred to be prohibited in s. 14 is the carrying of goods without either licence A or C. In my respectful view, allowing the appeal and thereby allowing the appellant's claim will not defeat the object of the Act, in general or even s. 14, in particular. The integrity of our legal system is not, in my view, compromised and it certainly cannot be said that the appellant here, even if considered a wrongdoer, which I do not find to be the case, will be benefiting or profiting from the wrongdoing. The claim before the High Court remains always a claim for services rendered under the four agreements. Those services were admittedly rendered and must be paid. In fact, the respondent had offered to pay but had subsequently, reneged.

[118] The learned judge is plainly wrong and has fundamentally misdirected itself on the law and on the facts. Following the Federal Court's decisions in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 and *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064 which affirmed the earlier decisions in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 and *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, the appellate court is under a duty to intervene.

Conclusion

[119] For all these reasons, the learned judge's decision on illegality is wrong and must be set aside. Contrary to the respondent's claim that the first rights and options have not arisen at the time of filing of the action on 15 January 2013, the rights have with the last agreement having lapsed on 13 January 2013. There is also no evidence from the respondent save to say that the sums have been paid; and that the services were found to be wanting. The appeal is therefore allowed and the appellant's claim is further allowed on the terms as prayed in the statement of claim with costs here and below.